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Aband.

**To: Group Director**

**Group: 3720**

Fax No.: 703-305-3762

Date: March 31, 2004

Total pages including cover sheet: 7 pages

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**U R G E N T**

Re: Serial No. 09/780,073 (attorney docket No. RPC 0557 PUS)

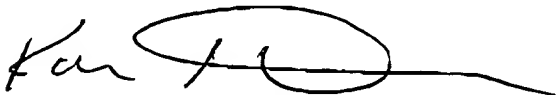
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Dear Director:

Attached please find the following documents:

1. Petition To Withdraw Abandonment (6 pages)

Thank you. Please call if you have any questions.



Konstantine Diamond

Docket No. RPC 0557 PUS

Serial No: 09/780,073

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of: William P. Apps

Examiner: Castellano

Serial No.: 09/780,073

Group Art Unit: 3727

Filed: February 9, 2001

For: NESTABLE CAN TRAY WITH CONTOURED WALL STRUCTURE

Attorney Docket No: RPC 0557 PUS

**PETITION TO WITHDRAW ABANDONMENT**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Applicant hereby petitions for withdrawal of the Abandonment mailed by the Examiner March 24, 2004 (Attachment A).

**Brief Summary of Relevant Facts**

On June 17, 2002, Applicant filed a Notice of Appeal.

On November 18, 2002, Applicant filed an Appeal Brief.

On December 6, 2002, the Examiner reopened prosecution.


On May 6, 2003, Applicant filed another Notice of Appeal.

On July 31, 2003, Applicant filed its Appeal Brief together with an "Amendment with Appeal" (under MPEP §1207) correcting a few minor typographical or antecedent basis issues that the Examiner had pointed out.

On August 19, 2003, the Examiner mailed an Advisory Action, refusing to enter the Amendment with Appeal, saying it "further complicates the issues for appeal," but indicated that the amendment to claim 22 would be permitted if submitted separately.

**CERTIFICATE OF FACSIMILE TRANSMISSION**

I hereby certify that the enclosed Petition to Withdraw Abandonment, and all enclosures referred to herein, is being sent via facsimile to 703 305-3762 on March 31, 2004.

  
Konstantine J. Diamond

Docket No. RPC 0557 PUS

Serial No: 09/780,073

On August 19, 2003, the Examiner also mailed a Notice of Non-compliance for two reasons: a) Applicant did not argue the §112 rejections (Applicant had assumed that the Amendment with Appeal would be routinely entered, since they were minor §112 rejections that the Examiner had pointed out); and b) The Examiner felt there was some confusion in the grouping of the claims.

On September 22, 2003, Applicant submitted a "Substitute Appeal Brief", in which Applicant tried to address the Examiner's concerns regarding grouping. Applicant also added an argument section for the minor §112 rejections. Applicant also submitted a Second Amendment with Appeal, which only amended claim 22, as the Examiner indicated would be permitted. Appellant's Appendix properly reflected the current status of the claims (i.e. prior to entry of the Second Amendment with Appeal).

On October 21, 2003, the Examiner mailed an Advisory Action indicating that the Second Amendment with Appeal (of claim 22 only) would be entered.

On October 24, 2003, Applicant's representative telephoned the Examiner regarding the Advisory Action. Applicant's representative told the Examiner that Applicant would file a new appendix reflecting the amendment to claim 22 with Applicant's reply brief, and that there is no requirement for Applicant to file a whole new Appeal Brief. The Examiner did not indicate whether he thought a new Brief was required or not, as he had not seen the Brief yet.

On March 24, 2004, six months after the Substitute Appeal Brief was filed, the Examiner mailed a "Communication Re: Appeal" indicating that the appeal is dismissed and the application is abandoned for these reasons:

Continuation Sheet (PTOL-461)

Application No. 09/780,073

Continuation of 3. (d) Other. The arguments presented for separate patentability of Groups B-G are insufficient. In particular, Groups B-D seem to present the same argument. Claims 6 (Group B), 13 (Group C) and 22 (Group D) have similar language stating that the band is "contoured downwardly." The discussion presented under the various headings for Groups B-D merely state that these claims have different language. It seems that Groups B-D would be unpatentable based upon one concept: The band of Apps ('925) is contoured downwardly. Also, the copy of the appealed claims in the Appendix is incorrect because claim 22 has been amended to delete the phrase "adjacent the parallel portions."

### Argument and Request for Relief

Regarding grouping, it appears from the Examiner's statement above that the Examiner simply disagrees with Applicant's arguments regarding patentability. In the brief, Applicant's Argument section explains for each group: a) the claim language that is not present in the claims in the other groups; and b) that this claim language is not found in the prior art reference. This is the very definition of "independently patentable" claims. The Examiner may argue that the different language does not change the outcome, but those arguments should appear in the

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Examiner's Answer. More importantly, those arguments should be reviewed by the Board, not used as a justification to avoid review of the rejection entirely.

Regarding the appendix, Claim 22 was amended to fix a minor error in the Second Amendment with Appeal, which was not entered until after the Substitute Appeal Brief was filed. Therefore, the Appendix in the Substitute Appeal Brief was correct when filed. There is no requirement for Applicant to file a whole new Appeal Brief (and presumably pay extension fees and restart the Examiner's period for the Examiner's Answer).

It is now almost two years since Applicant's original Notice of Appeal was filed, and almost eleven months since Applicant's second Notice of Appeal was filed. Applicant has filed three Briefs and the Examiner has not filed any. This appeal should be considered on its merits by the Board.

For the above reasons, Applicant requests a withdrawal of the abandonment of this application, entry of Applicant's Substitute Appeal Brief, Reinstatement of the appeal and a direction for the Examiner to file an Examiner's Answer by a prompt date certain.

No fee should be due, but if a petition fee is required, please charge Deposit Account No. 50-1984.

Respectfully submitted,



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Phone (323) 262-5145  
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Dated: March 31, 2004

Attachment 4



## UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/780,073	02/09/2001	William P. Apps	RPC 0557 PUS	7630

7590 03/24/2004

KONSTANTINE J. DIAMOND  
4010 E. 26th STREET  
LOS ANGELES, CA 90023

EXAMINER

ART UNIT PAPER NUMBER

RECEIVED  
REHRIG PACIFIC COMPANY

DATE MAILED: 03/24/2004

MAR 29 2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Attachment A-1

**Communication Re: Appeal**

Application No.

09/780,073

Applicant(s)

Apps, William

Examiner

Stephen J. Castellano

Art Unit

3727

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

1. ☐ The Notice of Appeal filed on \_\_\_\_\_ is not acceptable because:

- (a) ☐ it was not timely filed.
- (b) ☐ the statutory fee for filing the appeal was not submitted. See 37 CFR 1.17(b).
- (c) ☐ the appeal fee received on \_\_\_\_\_ was not timely filed.
- (d) ☐ the submitted fee of \$\_\_\_\_\_ is insufficient. The appeal fee required by 37 CFR 1.17(b) is \$\_\_\_\_\_.
- (e) ☐ the appeal is not in compliance with 37 CFR 1.191 in that there is no record of a second or a final rejection in this application.
- (f) ☐ a Notice of Allowability, PTO-37, was mailed by the Office on \_\_\_\_\_.

2. ☐ The appeal brief filed on \_\_\_\_\_ is NOT acceptable for the reason(s) indicated below:

- (a) ☐ the brief and/or brief fee is untimely. See 37 CFR 1.192.
- (b) ☐ the statutory fee for filing the brief has not been submitted. See 37 CFR 1.17(c).
- (c) ☐ the submitted brief fee of \$\_\_\_\_\_ is insufficient. The brief fee required by 37 CFR 1.17(c) is \$\_\_\_\_\_.

**The appeal in this application will be dismissed unless corrective action is taken to timely submit the brief and requisite fee. Extensions of time may be obtained under 37 CFR 1.136(a).**

3. ☒ The appeal in this application is DISMISSED because:

- (a) ☐ the statutory fee for filing the brief as required under 37 CFR 1.17(c) was not timely submitted and the period for obtaining an extension of time to file the brief under 37 CFR 1.136 has expired.
- (b) ☐ the brief was not timely filed and the period for obtaining an extension of time to file the brief under 37 CFR 1.136 has expired.
- (c) ☐ Request for Continued Examination (RCE) under 37 CFR 1.114 was filed on \_\_\_\_\_.
- (d) ☒ other: See Continuation Sheet

4. ☒ Because of the dismissal of the appeal, this application:

- (a) ☒ is abandoned because there are no allowed claims.
- (b) ☐ is before the examiner for final disposition because it contains allowed claims. Prosecution on the merits remains CLOSED.
- (c) ☐ is before the examiner for consideration of the submission and prosecution has been reopened pursuant to 37 CFR 1.114.

*S. Castellano*  
Stephen J. Castellano  
Primary Examiner  
Art Unit: 3727

*Attachment*  
A-2

## Continuation Sheet (PTOL-461)

Application No. 09/780,073

Continuation of 3. (d) Other: The arguments presented for separate patentability of Groups B-G are insufficient. In particular, Groups B-D seem to present the same argument. Claims 6 (Group B), 13 (Group C) and 22 (Group D) have similar language stating that the band is "contoured downwardly." The discussion presented under the various headings for Groups B-D merely state that these claims have different language. It seems that Groups B-D would be unpatentable based upon one concept: The band of Apps ('925) is contoured downwardly. Also, the copy of the appealed claims in the Appendix is incorrect because claim 22 has been amended to delete the phrase "adjacent the parallel portions."

Attachment  
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